Supreme Court, U.S.
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No. 95-841

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

ALBERT AKINS, *et al.*,
Petitioners,
v.

ZENECA INC.; RHONE-POULENC, INC.;
RHONE-POULENC BASIC CHEMICALS COMPANY;
STAUFFER CHEMICAL COMPANY;
INTERNATIONAL UNION OF OPERATING
ENGINEERS, AFL-CIO; LOCAL 912,
INTERNATIONAL UNION OF OPERATING
ENGINEERS, AFL-CIO,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF RESPONDENT ZENECA INC. IN OPPOSITION

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QUESTIONS PRESENTED

Petitioners present a four-page list of argumentative "Questions Presented," which presumes facts that simply are not in the record. Notwithstanding petitioners' assertions, the only questions presented as to respondent Zeneca Inc. (formerly known as ICI Americas Inc. ("ICIA")) are:

1. Whether the Court of Appeals properly affirmed summary judgment in favor of ICIA on petitioners' claim under Section 301 of the Labor Management Relations Act, as amended, 29 U.S.C. § 185, because ICIA did not breach any contractual obligations to petitioners.

2. Whether the Court of Appeals properly affirmed summary judgment in favor of ICIA on petitioners' state law claims for tortious interference with contract and conspiracy.

RULE 29.6 CORPORATE AFFILIATION STATEMENT

Respondent Zeneca Inc. is ultimately owned 100% by Zeneca Group PLC, a publicly-owned company incorporated under the laws of England. Zeneca Group PLC owns 100% of the common stock of Zeneca Limited, a company incorporated under the laws of England. Zeneca Limited owns 100% of the common stock of Zeneca Investments Limited, a company incorporated under the laws of England. Zeneca Investments Limited owns 100% of the common stock of Zeneca Holdings Inc., a Delaware corporation. Zeneca Holdings Inc. owns 100% of the common stock of Zeneca Inc., a Delaware corporation, with its principal place of business at Wilmington, Delaware 19897.

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BRIEF OF RESPONDENT ZENECA INC. IN OPPOSITION

Respondent, Zeneca Inc. (formerly known as ICI Americas Inc., and hereafter referred to as "ICIA"),[1] respectfully requests that this Honorable Court deny the petition for writ of certiorari which seeks review of the Sixth Circuit Court of Appeals' decision below.

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[1] ICI Americas Inc. changed its name to Zeneca Inc. effective December 27, 1992 (R. 167). Because the Company's name was ICI Americas Inc. at the time of the relevant events, and at the time this lawsuit was filed, the name "ICIA" will be used in this brief.

STATUTE INVOLVED

29 U.S.C. § 185(a) provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE

While petitioners' statement broadly captures the pertinent chronology, the statement contains inaccuracies and omissions of key facts. Contrary to the petition's suggestion (p. 3), the parties to the 1982 collective bargaining agreements ("CBAs") for Stauffer's furnace plant and organic plant were Local 912 and Stauffer, not petitioners and Stauffer. For every CBA since 1974, the Local 912 negotiating committee for each plant has had advance authorization from the bargaining unit employees to accept a new CBA without approval or ratification by the employees. (R. 136 at 130-31, 145-46, 163, 469).

Contrary to the petition (p. 3), there is no evidence that it was a "condition" of either 1982 Stauffer CBA, or of the September 13, 1982 Memorandum of Agreement, (also referred to as the "cross-bumping agreement"), that any employee would "retain" a "transfer right" to the other plant. Rather, as the Court of Appeals noted, each CBA provided only that the cross-bumping agreement "shall be considered as supplemental to the [CBA] between the parties . . . and shall remain in full force and effect during the period of such [CBA] unless modified by the parties in writing." (A-4). Each CBA remained in effect for three years.

Petitioners omit any reference to the undisputed evidence on summary judgment [2] confirming that the cross-bumping memorandum was simply "part and parcel" of each CBA that included it. The memorandum did not stand on its own. (R. 136 at 74-75, 135-36, 157-58, 320-21, 470-71, 509, 533; R. 162, ¶ 22). Thus, petitioners fail to mention that the 1985 CBAs for each of two Stauffer plants again simply provided that the cross-bumping memorandum was supplemental to the CBAs and that it would remain in effect only for the three-year duration of each CBA. (A-4).

Likewise, after the two plants were under separate ownership,[3] ICIA's 1988 CBA for the organic plant again merely provided that the cross-bumping document was supplemental to the June 11, 1988 - June 11, 1991 CBA, and that it would remain in effect for that three-year period. (A-5; R. 162, ¶ 56; R. 136 at 361-62). ICIA's June 11, 1991 organic plant CBA, which deleted all references to the 1982 cross-bumping memorandum, provided that it "shall supersede and cancel the previous agreement between the parties." (R. 162, ¶¶ 74, 76-77; R. 136 at 272-73, 371-74).

Nothing in the cross-bumping memorandum said that it must be included in any future CBA, that it had any

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[2] Because the District Court granted summary judgment to ICIA on all claims, the only relevant record as to ICIA is that which was before the district court on summary judgment. *Lippi v. City Bank*, 955 F.2d 599, 604 (9th Cir. 1992); *Nissho-Iwai American Corp. v. Kline*, 845 F.2d 1300, 1307 (5th Cir. 1988); *Voutour v. Vitale*, 761 F.2d 812, 817 (1st Cir. 1985), *cert. denied*, 474 U.S. 1100 (1986).

[3] The petition incorrectly states that ICIA purchased the furnace and organic plants in 1987, and then sold the furnace plant to Rhone-Poulenc. The accurate fact, as noted by the Court of Appeals, is that various corporate affiliates of Imperial Chemical Industries, P.L.C. purchased the entity owning the two plants. One of the affiliates retained the organic plant and merged it into ICIA. Another affiliate operated the furnace plant for a short time before Rhone-Poulenc acquired it.

greater duration than the CBA of which it was a part, or that the document was to have any force or effect if it was not included in subsequent CBAs. Similarly, the 1988-1991 CBA for ICIA's organic plant did not state that the memorandum would have any greater duration than that three-year CBA, or that it had to be included in any later CBA. (A-18 n.6).

Petitioners' suggestion (petition, pp. 7-8) that ICIA did something less than vigorously defend against Local 912's declaratory judgment action is nonsense, and contrary to the undisputed evidence. (R. 136 at 588-90). ICIA deposed Rhone-Poulenc's plant manager, and all parties engaged in extensive written discovery. When, on advice of counsel, Local 912 dismissed the action as moot due to the deletion of the cross-bumping memorandum from ICIA's CBA, eighteen days still remained before the discovery cutoff date. Dispositive motions were not due for a month and a half. (R. 162, ¶¶ 67, 81).

The fact that ICIA had not filed a dispositive motion before completion of discovery, and a month and a half before it was due, is not evidence of something other than standard litigation practice. Likewise, there is not an iota of evidence that ICIA or Rhone-Poulenc "waited" to do anything, or that some nefarious "agreement was apparently reached between ICI and the Union." (Petition, pp. 8, 10 n.4).[4]

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[4] The meritless nature of petitioners' claims is confirmed by petitioners' reliance on a letter from ICIA's counsel (not from "ICI" as petitioners suggest in a misleading fashion) in which an effort was made to resolve the declaratory judgment action six months before ICIA's new organic plant CBA rendered the action moot. (Petition, pp. 8-10). A party's inquiry regarding potential resolution of a lawsuit hardly is evidence of a secret conspiracy, especially when the same party also vigorously litigates the matter.

Finally, petitioners state in a misleading fashion that "[n]o member from the bargaining unit at the furnace plant was permitted to participate in the negotiations relating to the organic plant." (Petition, p. 11). The undisputed evidence is that petitioners made no effort to participate in ICIA's organic plant negotiations, although no one told petitioners that they could not participate. (R. 136 at 166, 170-71, 525-27, 559-60).

REASONS FOR DENYING THE WRIT

The Court of Appeals correctly affirmed summary judgment in favor of ICIA. The petition fails to implicate any of the special and important reasons for granting a petition for a writ of certiorari as set forth in Supreme Court Rule 10.1. Instead, petitioners simply assume without evidentiary basis that they had vested rights against ICIA, and argue that the Court of Appeals was wrong because it did not agree with petitioners' contention.

I. THE COURT OF APPEALS CORRECTLY HELD THAT PETITIONERS HAD NO VESTED RIGHT TO JOBS AT ICIA'S PLANT. ANY RIGHT OF PETITIONERS TO DEMAND JOBS AT THE PLANT CEASED WHEN ICIA'S COLLECTIVE BARGAINING AGREEMENT DELETED THE CROSS-BUMPING AGREEMENT.

The Court of Appeals correctly rejected petitioners' claim that they had a vested right to employment at ICIA's plant. As the court noted, nothing in the cross-bumping agreement or any extrinsic evidence indicates that any right to transfer to the organic plant was intended to be vested. Nor was the nature of petitioners' claimed right within the special class of entitlements that an employee works to accumulate over time, such as retirement benefits. Accordingly, any claim to employment at ICIA's plant ended when the Company and Local 912 reached a new CBA which deleted the cross-bumping

memorandum. (A-16 - A-20). Notably, petitioners do not even argue that the Court of Appeals erred in this regard.

Instead, petitioners' contentions regarding ICIA are that "an employer may not claim the benefit of a contract which the Union is not authorized to make" (petition, p. 20), and that ICIA "should not be permitted to retain the benefits received from inducing the Union to breach its contractual and trust obligations to Petitioners." (*Id.*, p. 22). Both arguments are specious, since they assume facts that are not present in the record.

There is no evidence that the Union lacked authorization to enter into a CBA with ICIA for its organic plant, or that ICIA induced the Union to do anything. As the Court of Appeals held, the Union Constitution permitted the membership of each bargaining unit to elect its own negotiating committee, with authority to approve CBAs for their particular plant. (A-24 - A-25). It is undisputed that since 1974 every Local 912 negotiating committee, including the 1991 organic plant committee, had advance authorization to enter into a CBA without ratification by bargaining unit employees. It is similarly undisputed that ICIA and the negotiating committee arrived at a CBA on June 11, 1991 after bargaining over its terms. Accordingly, petitioners' reliance on *Steele v. L. & N. R.R.*, 323 U.S. 192 (1944), and *Brotherhood of Locomotive Firemen v. Mitchell*, 190 F.2d 308 (5th Cir. 1951), is inappropriate.[5]

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[5] Even assuming that Local 912 had no authority to enter into the June 11, 1991 organic plant CBA, which is not the case, ICIA still would be entitled to enforce the CBA. The Union had apparent authority to enter into the CBA, and ICIA could reasonably believe that the Union possessed that authority. *See Kozera v. Westchester-Fairfield Chapter of Nat'l Elec. Contractors Ass'n*, 909 F.2d 48, 54 (2d Cir. 1990), *cert. denied*, 498 U.S. 1084 (1991) (agreement was binding even though it had not been ratified by membership, and union violated duty of fair representation and disclosure, where employer could reasonably believe that union had authority to bind union membership); *NLRB v. Truckdrivers Local Union No. 100*, 532 F.2d 569, 571 (6th Cir.), *cert. denied*, 429 U.S. 869 (1976)

Finally, no matter how petitioners characterize their argument, they are making an inappropriate attack on the validity of ICIA's June 11, 1991 CBA. The Court of Appeals noted that this challenge was not properly before the court, because it lacked jurisdiction under § 301 to decide the validity of CBAs. (A-17 n. 5 (citing *Adcox v. Teledyne, Inc.*, 21 F.3d 1381, 1386 (6th Cir.), *cert. denied*, —— U.S. ——, 115 S. Ct. 193 (1994)).

Any claim petitioners may once have had to potential employment at ICIA's organic plant ended with ICIA's June 11, 1991 CBA. Accordingly, the Court of Appeals properly affirmed summary judgment in favor of ICIA on the § 301 claim.

II. THE COURT OF APPEALS PROPERLY AFFIRMED SUMMARY JUDGMENT IN FAVOR OF ICIA ON PETITIONERS' STATE LAW CLAIMS.

There can be no conspiracy claim absent a "combination between two or more persons to accomplish by concert an unlawful purpose or to accomplish a purpose, not in itself unlawful, by unlawful means." *Hardin v. Caldwell*, 695 S.W.2d 189, 191 (Tenn. Ct. App. 1985), *later proceeding*, 60 B.R. 214 (E.D. Tenn.), *later proceeding*, 67 B.R. 296 (E.D. Tenn. 1986), *later proceeding*, 851 F.2d 852 (6th Cir. 1988). For two independent reasons, the Court of Appeals correctly affirmed summary judgment in favor of ICIA on petitioners' state law claims for conspiracy and tortious interference with contract.

(while a Union's membership may require ratification by the membership, an employer may rely upon the apparent authority of the Union representatives to conclude an agreement, where there is a basis for such reliance) (citing *International Union of Elevator Constructors, Local No. 8*, 185 N.L.R.B. 769 (1970), *enforced*, 465 F.2d 974 (9th Cir. 1972)); and *Moreau v. Local Union No. 247, Int'l Bhd. Of Firemen*, 851 F.2d 516, 520 (1st Cir. 1988) (an agreement entered into by a union representative with apparent authority to bind the union is valid and binding even if actual authority, such as through membership ratification, is lacking).

First, petitioners presented no evidence that ICIA combined with anyone to do anything. The record contains no evidence remotely supporting petitioners' fanciful suggestions about what the respondents "must have" thought or done. (Petition, p. 21).

Second, both the conspiracy and tortious interference with contract claims fail because there is no evidence supporting the tortious interference claim. *See Forrester v. Stockstill*, 869 S.W.2d 328, 330 (Tenn. 1994) (no conspiracy claim absent proof of the underlying tort claim). Malice is an essential element of a tortious interference claim in Tennessee. *Testerman v. Tragesser*, 789 S.W.2d 553, 556-57 (Tenn. Ct. App. 1989). Petitioners presented no evidence that ICIA acted with malice at any time. To the contrary, ICIA was completely justified in entering into a new CBA containing no reference to the cross-bumping document, thus ending any argument as to ICIA about the document. *See Polk & Sullivan, Inc. v. United Cities Gas Co.*, 783 S.W.2d 538, 543 (Tenn. 1989) (justification exists when "defendant has acted merely in the due exercise of his own right to carry on his business himself.").

Petitioners' state law claims are without merit. As with petitioners' federal claims, nothing warrants review by this Court.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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